

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Aeronca, Inc.) ASBCA No. 51927
)
Under Contract No. F09603-96-C-0010)

APPEARANCES FOR THE APPELLANT: William W. Thompson, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE MOED
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

FACTUAL STATEMENT FOR THE PURPOSES OF THE MOTION

1. At the time of these events, the mission of Warner-Robins Air Logistics Center ("Warner-Robins") included the repair of left-hand and right-hand engine aft cowl doors (ACDs) for C-141 aircraft. During September 1995, Warner-Robins determined that an emergency requirement for repair of 100 ACDs should be satisfied through contractual procurement. Aeronca, Inc., which was the most recent producer of new ACDs, was informally asked to submit a proposal for that work.

2. In order to prepare the requested proposal, Aeronca needed information as to the condition of the ACDs and the expectable scope of required work. On or about 25 September 1995, in response to that need, Warner-Robins furnished to Aeronca, a copy of the "Computed Materials Requirements" schedule (also referred to as the "hit list") which contained the names and national stock numbers (NSN's) of the ACD components and the rates of repair or replacement experienced by Warner-Robins in performing this work. (R4, tab 53)

3. Thereafter, by letter dated 13 October 1995, Warner-Robins formally requested Aeronca to submit a fixed price proposal for the work. Aeronca was permitted to propose

on a not-to-exceed (NTE) price basis if it could not submit a fixed price proposal by 20 October 1995. Due to the urgency of the requirement, award would be made under a letter contract, with definitization into a firm, fixed price contract to be effected within 180 days. (App. supp. R4, tab 10)

4. On 19 October 1995, Aeronca submitted a proposal offering a NTE unit price of \$67,722 for the repairs. That price, however, was based upon the Government's acceptance of certain changes to the Statement of Work (SOW) including addition of the following:

In the event that repair requirements are significantly different than the expected replacement rate as provided in the data from Warner Robins ALC, Aeronca will have the right to submit a claim for over and above requirements and WRALC agrees to negotiate in good faith to satisfy the additional requirement.

(R4, tab 1 at Attachment A)

5. Aeronca had asked for insertion of the above provision because it "did not know what shape all of the doors would be in when they arrived." The contracting officer refused to accept that provision. She asked Aeronca to delete the same and submit a proposal which was "realistic yet take into account the worse case scenario." (R4, tab 2) On 23 October 1995, Aeronca submitted a revised proposal omitting the above provision but increasing the NTE unit price for the repairs to \$72,500. The total NTE price proposed by Aeronca was \$7,472,407. (R4, tab 3)

6. On 3 November 1995, the parties entered into a letter contract bearing the above contract number (R4, tab 6). The schedule contained CLINs 0001 and 0002 for "[a]ll services and materials for the repair of 100 ACDs" in accordance with listed specifications, at a price "to be negotiated." The only provision in the contract relating to price was the FAR 52.216-24 LIMITATION OF GOVERNMENT LIABILITY (APR 1984) clause, prescribed for letter contracts, in which the amount of \$3,736,203.50 was set forth as both the maximum amount which Aeronca was authorized to expend in performance of the work and also as the maximum amount for which the Government would be liable in the event of termination of the letter contract. Those amounts were exactly 50 percent of the total NTE price proposed by Aeronca. Pursuant to the schedule in the letter contract, negotiations for definitization were to be completed by 29 March 1996 and a definitized firm, fixed price contract signed by the parties on 26 April 1996. The contract also contained the FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (APR 1984) clause.

7. On 26 April 1996, following negotiations, Aeronca submitted its "best and final" firm, fixed-price offer for definitization of the contract. Aeronca proposed separate prices for disassembly and for repair and re-assembly of the ACD's. Based on a total of 100

ACD's, the proposed unit prices were \$8,440 for disassembly and \$59,825 for repair and re-assembly. (R4, tab 20) A letter dated 30 April 1996 from Aeronca to the contracting officer states that "final agreement" on those prices was reached on 26 April 1996 (R4, tab 21). A certificate of current cost and pricing data pursuant to FAR 15.804 was submitted by Aeronca on 30 April 1996 (R4, tab 22).

8. Subsequently, on 13 May 1996, at 2:11 p.m., by facsimile, the contracting officer notified Aeronca of the partial termination of the contract for the convenience of the Government to the extent of the repair and re-assembly of 80 ACD's. Aeronca was directed "[e]ffective immediately upon receipt of this notice, [to] terminate all actions necessary for" the work which had been terminated and "[i]mmediately stop all work, terminate subcontracts, and place no further orders except to the extent necessary to perform the portion of the contract not terminated hereby." (R4, tab 23)

9. At 3:29 p.m. on 13 May 1996, which was approximately one hour after directing the partial convenience termination of the contract, the contracting officer transmitted proposed contract Modification No. P00001 to Aeronca, by facsimile. The stated purpose of that modification was to "partially definitize the contract to the extent of establishing" the CLINs set forth therein (R4, tab 27). The definitization related to CLINs 0001AA and 0002AA for disassembly of 100 ACD's. The firm fixed unit price of \$8,440 proposed by the contracting officer for these CLINs was that agreed to by the parties as of 26 April 1996 (Factual Statement, 7). Also set forth in proposed contract Modification No. P00001, at prices "to be negotiated," were CLINs 0001AB and 0002AB for repair and re-assembly of 100 ACD's. Aeronca signed contract Modification No. P00001 as proposed on 13 May 1996, followed by the contracting officer's signature thereof on 14 May 1996. (R4, tabs 26, 27)

10. The agreement on contract Modification No. P00001 was followed, on 17 June 1996, by an agreement to contract Modification No. PZ0001. That instrument states at the outset that "[b]y issuance of this document, letter contract F09603-96-C-0010 is both definitized and partially terminated." In Section B ("Supplies or Services and Prices/Costs") thereof, CLINs 0001AA and 0002AA for disassembly of 100 ACDs were carried over at the existing unit price of \$8,440 previously agreed in contract Modification No. P00001. New CLINs 0001AC and 0002AC, for "termination of reassembly" of 80 ACDs, were established at prices "to be negotiated by [the termination contracting officer]." The CLINs for repair and re-assembly of the ACDs (CLINs 0001AB and 0002AB), which were unpriced in contract Modification No. P00001, were priced in contract Modification No. PZ0001 at \$59,825 for each of the 20 units remaining in the contract. (R4, tab 28)

11. The Government's papers in opposition to the present motion contain the affidavit of Mr. Ransford L. Mitchell, a quality assurance specialist employed by the Defense Logistics Agency, who was responsible, on behalf of the Government, for

inspection and acceptance of Aeronca's performance under the contract. Mr. Mitchell stated that: on or about 17 May 1996 he "accepted the completed performance of Aeronca regarding the disassembly of the 100 cowl doors." This is not disputed by Aeronca. Another affidavit submitted by the Government states, again without dispute on the part of Aeronca, that as part of the disassembly work, Aeronca prepared and submitted "Condition Found" reports which described "the repair work needed for each aft cowl door as determined by Aeronca as or after each door was disassembled" (affidavit of Jim Tomberlin, at 1).

12. Sworn declarations submitted by the parties in connection with the present motion, indicate agreement that repair and reassembly of the first ACD was completed by Aeronca on or about 26 July 1996 and that the work as to all 20 units was completed and accepted by the Government on or about 9 December 1996.

13. On 14 February 1997, Aeronca submitted a convenience termination settlement proposal seeking a net payment, after deduction of progress payments, in the amount of \$772,419.01 (R4, tab 30).

14. On 3 October 1997, the parties entered into contract Modification No. A00001 which by its terms "settle[d] the termination settlement proposal resulting from the Notice of Termination dated May 13, 1996" (R4, tab 41). The settlement took the form of establishing a unit price of \$21,008.14 for 80 units of repair and reassembly work described as the "terminated portion of the contract." There is nothing in the present record concerning the composition of that unit price.

15. On 15 May 1998, Aeronca filed a claim for equitable adjustment in the amount of \$1,566,033 (R4, tab 53). That claim was certified in conformity with the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The principal element of the claim, in the amount of \$1,152,990, was for "additional labor expended on the 20 doors that were fabricated, reassembled, and delivered by Aeronca." The remaining amount was for profit and CDA interest. The claim was denied in its entirety by the contracting officer in a written decision dated 27 October 1998 which is the basis of this appeal.

DECISION

Aeronca's claim is based on ¶ (k) of the TERMINATION FOR CONVENIENCE OF THE GOVERNMENT FIXED-PRICE (APR 1984) clause which provides that "[i]f the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract." Aeronca contends that it is entitled to an equitable adjustment for the "additional costs of performing fewer units of work under the unterminated portion of the 'definitized' contract." (App. mot. at 3)

In this motion, Aeronca asks the Board to grant summary judgment in the form of “a declaratory judgment” that:

(1) Because the contract was partially terminated for convenience, Aeronca is entitled to an equitable adjustment based upon its actual costs for disassembly of 100 [ACDs], and for repair and reassembly of the unterminated 20 [ACDs]; and

(2) Modifications P00001 and PZ0001, which purport to definitize unit prices for the contract, do not limit Aeronca’s right to recover pursuant to the terms of the contract and the applicable Federal Acquisition Regulations provisions.

(*Id.* at 10)

We have no jurisdiction to render declaratory judgments in this appeal. Such jurisdiction exists only for appeals involving claims for the interpretation or adjustment of contract terms. Appeals relating to claims seeking monetary relief only, such as the present one, are not eligible for declaratory relief. *McDonnell Douglas Corp.*, ASBCA No. 50592, 97-2 BCA ¶ 29,199

The motion can be viewed, however, as seeking summary judgment that Aeronca is entitled to recover on its claim. We have no jurisdiction, however, as to the assertion that Aeronca is entitled to an equitable adjustment in price with respect to the disassembly operation. The certified claim was a demand for an increase in price for “additional labor expended on the 20 doors that were fabricated, reassembled, and delivered by Aeronca” (Factual Statement, 15). There was no request for additional compensation with respect to the disassembly operation, which was established as a separate CLIN in the definitization process (Factual Statement, 9, 10). Accordingly, Aeronca’s entitlement to additional payment with regard to the disassembly operation is not part of the present appeal and will not come within our jurisdiction under the CDA until it has been presented to, and decided by, the contracting officer and thereafter timely appealed. *Keco Industries, Inc.*, ASBCA No. 50524, 00-1 BCA ¶ 30,857.

To succeed on the aspect of the motion properly before us, Aeronca is required to show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

Aeronca contends that “[t]he parties’ course of conduct conclusively establishes that neither party regarded the unit prices as a limitation on Aeronca’s legal right to an equitable adjustment if the doors proved to be more costly as a result of the reduction in quantities” (app. mot. at 3). There are indications to the contrary in the present record.

With regard to the claim for added costs of repair and reassembly of 20 ACDs, Aeronca had prepared and submitted “Condition Found” reports as part of the disassembly work. These reports described the repair work needed for each ACD as, or after, it was disassembled (Factual Statement, 11). Inasmuch as the disassembly work had been completed as of 17 May 1996, Aeronca would have had detailed knowledge as to the needed repairs prior to signing contract Modification No. PZ0001 setting a fixed unit price of \$59,825 for repair and reassembly of 20 ACDs (Factual Statement, 10).

As the party defending against the motion for summary judgment, the Government is entitled to the benefit of all inferences that can reasonably be drawn from the facts. *Bell-Boeing Joint Venture*, ASBCA No. 39681, 93-2 BCA ¶ 25,791 at 128,342. Aeronca had substantial knowledge of the extent of required work for the 20 ACDs to be repaired and reassembled and entered into contract Modification No. PZ0001 unconditionally setting a fixed unit price for repair and reassembly of the ACDs. An inference that could be reasonably drawn from the foregoing is that Aeronca understood and intended that this price constitute complete compensation for that work. This is in conflict with its assertion that the parties deemed the price to be open to adjustment to reflect actual costs of the work. The conflict as to the finality of the price agreed to in contract Modification No. PZ0001 for repair and reassembly of the 20 ACDs, is a genuine issue of material fact to be resolved by trial on the merits.

Accordingly, the motion is denied.

Dated: 22 December 2000

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51927, Appeal of Aeronca, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals